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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 273, 274, and 275

RIN 0584-AE48

Supplemental Nutrition Assistance Program (SNAP): Agricultural Act of 2014

Nondiscretionary Provisions

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: The Food and Nutrition Service (FNS) of the Department of Agriculture (USDA) is amending Supplemental Nutrition Assistance Program (SNAP or Program) regulations to codify certain nondiscretionary provisions of the Agricultural Act of 2014 (the “2014 Farm Bill”).

This final rule excludes medical marijuana from being treated as an allowable medical expense for the purposes of determining the excess medical expense deduction under SNAP. This rule also amends multiple SNAP regulations pursuant to nondiscretionary changes under the 2014 Farm Bill related to Quality Control (QC). This rule updates the QC error tolerance threshold to no more than \$37 for Fiscal Year (FY) 2014. For FY 2015 and thereafter, the QC tolerance level will be set annually based on an adjustment in the Thrifty Food Plan (TFP). In addition, this rule eliminates USDA’s ability to waive any portion of a State’s QC liability amount, except as provided in SNAP regulations that requires State agencies to use SNAP High Performance Bonus Payments only for

SNAP administrative expenses including investments in technology, improvements in administration and distribution, and actions to prevent fraud, waste and abuse. Finally, this rule amends SNAP regulations pertaining to the use of SNAP benefits to pay for container deposit fees. The 2014 Farm Bill prohibits SNAP benefits from being used to pay for container deposit fees in excess of any State fee reimbursement required to purchase food in a returnable bottle or can.

DATES: This rule will become effective on [insert date 60 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Vicky T. Robinson, FNS, 3101 Park Center Drive, Room #418, Alexandria, VA 22302, 703-305-2476.

SUPPLEMENTARY INFORMATION:

I. Background

General

On February 7, 2014, the President signed the 2014 Farm Bill. Amendments exclude medical marijuana from allowable medical expense deductions for SNAP purposes, update the QC error tolerance threshold for Fiscal Year (FY) 2014 and index this amount for FY 2015 and thereafter based on an adjustment in the Thrifty Food Plan (TFP), eliminate the Department's ability to waive any portion of a State's QC Liability amount except as provided in SNAP regulations at 7 CFR 275.23(f), ensure that State agencies may use High Performance Bonus Payments only for SNAP administrative expenses, and prohibit SNAP benefits from being used to pay for container deposit fees in excess of the State fee reimbursement.

Medical Marijuana

USDA is amending SNAP regulations at 7 CFR part 273 in accordance with Section 4005 of the

2014 Farm Bill. Under Section 4005, USDA is instructed to promulgate regulations to explicitly prohibit States from utilizing the excess medical deduction to deduct medical marijuana costs from a household's income for SNAP purposes.

Under the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, marijuana is a Schedule I controlled substance that has no currently accepted medical use and cannot be prescribed for medicinal purposes. 21 U.S.C. 812(b)(1)(C). SNAP is a Federal program and must conform to Federal law regarding illegal substances. Therefore, marijuana and other Schedule I controlled substances are not allowable medical expenses under SNAP. USDA is incorporating this requirement into the regulations at new subsection 7 CFR 273.9(d)(3)(iii)(B).

Error Tolerance Threshold

Section 16 (c)(1)(A)(ii)(I) of the Food and Nutrition Act of 2008 was amended by Section 4019 of the 2014 Farm Bill to require that the Secretary set the tolerance level for excluding small errors for fiscal year 2014, at an amount not greater than \$37. Until that point in time, the QC tolerance level was at \$50, meaning only variances that exceed \$50 were included in the calculation of the payment error rate. This threshold does not excuse a State from following correction or claims procedures for any over or under issuance that is under the tolerance level. Typically, changes that affect the QC review period are made effective the upcoming fiscal year so that State and Federal QC reviewers can prepare for the procedural and systematic changes required. However, since the QC review period for FY 2014 had already begun when the Act was signed, the Department was required to take immediate action at that point on announcement of a new threshold, and established the new \$37 threshold through an implementing memorandum on March 21, 2014. This rule codifies what was put in place via that implementing memorandum.

Section 4019 of the 2014 Farm Bill also requires USDA to adjust FY 2014's threshold by the percentage by which the Thrifty Food Plan (TFP) is adjusted under Section 3(u)(4) of the Food and Nutrition Act of 2008. The Department uses three TFPs to establish benefit levels, one for the 48 contiguous States and District of Columbia, one for Alaska, and one for Hawaii. Although there are different TFPs used in SNAP benefit calculation, the Department is required to have one national performance measure for State payment error rates. For that reason, the Department has concluded that it has no discretion in using a single TFP-related adjustment mechanism for all States.

For FY 2015, the Department adjusted the threshold amount by using the TFP for the 48 contiguous States and District of Columbia as the TFP baseline for all 53 State agencies, resulting in a tolerance level of \$38 for FY 2015. In this final rule, the Department is establishing that the threshold will be adjusted each year by using the TFP for the 48 contiguous States and District of Columbia. A policy memo will be issued to States notifying them of the adjustment to the threshold amount at the start of each QC review period.

Liability Amount Determinations

After each fiscal year, in accordance with regulatory requirements, a determination is made for each State agency as to whether or not that FY's QC Error Rate would lead to the State being assessed a liability amount. State agencies assessed liabilities are given the opportunity to pay their liabilities in full or designate 50 percent of the liability amount as at-risk for repayment if a liability amount for an excessive payment error rate is established for the following FY. State agencies must then designate the other 50 percent of the liability amount to be used for new

investment in approved activities to improve the administration of SNAP. In addition, States have the right to appeal their QC Liability amount in order to provide justification for why they were otherwise unable to effectively administer the program for that fiscal year.

Previously USDA had the authority to waive all or a portion of the liability, regardless of whether or not a State chose to appeal their QC Liability amount. While the Department has not utilized this authority with the current sanction system, the 2014 Farm Bill has provided that no portion of a State agency's liability amount is allowed to be waived by the Department, thereby negating existing regulatory provisions at § 275.23(f). Therefore, to comply with this change, the Department is removing the regulatory language which allowed USDA such authority at § 275.23(e)(1)(i) and moving the language at § 275.23(e)(1)(ii), §275.23(e)(1)(iii), and § 275.23(e)(1)(iv) up to become § 275.23(e)(1)(i) and §275.23(e)(1)(ii), and § 275.23(e)(1)(iii).

High Performance Bonuses

Previously, although the Department encouraged States to invest performance bonus money into program improvements and preventing fraud, there were no restrictions on how States could spend the bonus money they received. However, section 4021 of the Act now requires State awardees to spend their bonus money exclusively on SNAP administrative expenses. Congress' intent, written in the Act, is for States to use this bonus money to “carry out the program established under this Act (the Food and Nutrition Act of 2008), including investments in technology, improvements in administration and distribution; and actions to prevent fraud, waste, and abuse.” Therefore, USDA is adding regulatory language that prohibits the use of bonus payments for household benefits, including incentive payments, and requires States awarded SNAP High Performance Bonuses to

inform the Department of their intended plans for said bonus payments prior to expenditure in order to verify they will be used in a manner with which they were intended.

Container Deposit Fees

In accordance with Section 4001 of the 2014 Farm Bill, SNAP benefits may not be used to pay for container deposit fees in excess of the amount of any fee reimbursement established under State law. SNAP benefits may only be used to pay the amount required by the State and only for containers that meet the criteria covered in the State law. If an entity other than the State, such as the manufacturer, imposes a deposit fee in excess that must be paid to purchase a food product, the fee cannot be paid with SNAP benefits. Instead, the fee must be paid separately in cash or other form of payment. The prohibition applies regardless of whether the fee is included in the shelf price posted for the item.

SNAP regulations already provide that clients who purchase, with SNAP benefits, products that have container deposits for the purpose of subsequently discarding the product and returning the container in exchange for a cash refund of the deposit may be disqualified from the Program for trafficking. This provision helps strengthen SNAP regulations to prevent fraud and abuse by limiting the ability of SNAP clients to use their benefits to pay for container deposit fees and, therefore, reducing the amount of the cash refund they would be able to obtain when returning the container.

Currently the following ten States have some type of State container deposit fee requirement: California, Connecticut, Hawaii, Iowa, Massachusetts, Maine, Michigan, New York, Oregon, and Vermont. State law establishes the deposit amount and the types and sizes of containers covered

by the law. When purchasing a container with a State deposit requirement, the consumer pays the deposit to the retailer and receives a refund when an empty container is returned to a retailer or redemption center.

If a SNAP eligible product has a State deposit fee associated with it, the product remains eligible for purchase with SNAP benefits. In addition, the State deposit fee may be paid with SNAP benefits; however, any additional deposit fee amount in excess of the State deposit fee must be paid in cash or another form of payment other than SNAP benefits.

In order to codify this provision of the 2014 Farm Bill, the Department is modifying the definition of “Eligible Foods” at 7 CFR 271.2 to exclude any deposit fees in excess of the amount of the State deposit fee, regardless of whether the fee is included in the shelf price of the food or food product.

USDA is also amending SNAP regulations at 7 CFR 274.7, so that program benefits may not be used to pay for deposit fees in excess of the amount of the State fee reimbursement required to purchase any SNAP-eligible food item contained in a returnable bottle or can.

II. Procedural Matters

Issuance of a Final Rule

The Department has determined that this rule is appropriate for final rulemaking because we believe these amendments to be noncontroversial and because these provisions are nondiscretionary as they are required by the Act.

Regulatory Impact Analysis

This final rule has been designated as not significant by OMB.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this final rule would not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local or

Tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and Tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The Supplemental Nutrition Assistance Program (SNAP) is listed in the Catalog of Federal Domestic Assistance Programs under 10.551. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V, and related Notice (48 FR 29115, June 24, 1983), this program is excluded in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on

one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

FNS has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under EO 13175. On February 18, 2015, the agency held a webinar for tribal participation and comments. If a Tribe requests consultation, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions and modifications identified herein are not expressly mandated by Congress.

Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section (6)(b)(2)(B) of Executive Order 13132. USDA has considered this rule's impact on State and local agencies and has determined that it does not have Federalism implications.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely

implementation. State agencies were required to apply the threshold changes in this rule to all cases as of the FY 2014 QC review period. All other changes in this rule were effective immediately upon enactment of the Act, except the medical marijuana and container deposit fees changes which are not intended to have retroactive effect unless so specified in the Effective Dates section. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

The Department has reviewed this rule in accordance with the Department Regulation 4300-4, "Civil Rights Impact Analysis," to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, the Department has determined that this rule will not in any way limit or reduce the ability of protected classes of individuals to participate in SNAP. USDA has no data pertaining to the medical marijuana change. The change to container deposit fees does not apply to the certification determinations made on the intended beneficiaries of the SNAP. Quality Control procedures are designed to evaluate the accuracy of the application of SNAP certification policy and therefore, the evaluation procedures do not impact protected classes or individuals.

Paperwork Reduction Act

Information collections associated with the changes to the Quality Control error tolerance threshold have been approved under following OMB control numbers: 0584-0074, Worksheet for SNAP Quality Control Reviews (expiration date May 31, 2016), and 0584-0299 Form FNS-380-1,

Quality Control Review Schedule, Form FNS-380-1 (February 29, 2016). Other changes in this rule do not contain information collection requirements subject to approval by the Office of Management and Budget under the Paperwork Reduction Act of 1994.

E-Government Act Compliance

USDA is committed to complying with the E-Government Act, 2002, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 271

Food stamps, Grant programs--social programs, Reporting and recordkeeping requirements.

7 CFR Part 273

Administrative practice and procedures, Aliens, Claims, Supplemental Nutrition Assistance Program, Fraud, Grant Programs--social programs, Penalties, Reporting and recordkeeping requirements, Social Security, Students.

7 CFR Part 274

Food stamps, Grant programs-social programs, Reporting and recordkeeping requirements..

7 CFR Part 275

Administrative practice and procedure, Supplemental Nutrition Assistance Program, Reporting, and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR parts 271, 273, 274, and 275 are amended as follows:

PART 271 –GENERAL INFORMATION AND DEFINITIONS

1. The authority citation for part 271 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

§271.2 [Amended]

2. In § 271.2, amend the definition of Eligible foods by adding, at the end of paragraph (1), the words “and any deposit fee in excess of the amount of the State fee reimbursement (if any) required to purchase any food or food product contained in a returnable bottle, can, or other container, regardless of whether the fee is included in the shelf price posted for the food or food product”:

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

3. The authority citation for part 273 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

4. In §273.9, revise paragraph (d)(3)(iii) to read as follows:

§273.9 Income and deductions.

* * * * *

(d) * * *

(3)* * *

(iii) Prescription drugs, when prescribed by a licensed practitioner authorized under State law, and other over-the-counter medication (including insulin), when approved by a licensed practitioner or other qualified health professional.

(A) *Medical supplies and equipment.* Costs of medical supplies, sick-room equipment (including rental) or other prescribed equipment are deductible;

(B) *Exclusions*. The cost of any Schedule I controlled substance under The Controlled Substances Act, 21 U.S.C. 801 *et seq.*, and any expenses associated with its use, are not deductible.

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PART 274- ISSUANCE AND USE OF PROGRAM BENEFITS

5. The authority citation for part 274 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

6. In § 274.7, add paragraph (j) to read as follows:

§274.7 Benefits redemption by eligible households.

* * * * *

(j) *Container deposit fees*. Program benefits may not be used to pay for deposit fees in excess of the amount of the State fee reimbursement required to purchase any food or food product contained in a returnable bottle or can, regardless of whether the fee is included in the shelf price posted for item. The returnable container type and fee must be included in State law in order for the customer to be able to pay for the upfront deposit with SNAP benefits. If a SNAP eligible product has a State deposit fee associated with it, the product remains eligible for purchase with SNAP benefits, and the State deposit fee may be paid with SNAP as well; however, any fee in excess of the State deposit fee must be paid in cash or other form of payment other than with SNAP benefits.

PART 275-PERFORMANCE REPORTING SYSTEM

7. The authority citation for part 275 continues to read as follows:

Authority: 7 U.S.C. 2011-2036.

8. In §275.12, revise paragraph (f)(2) to read as follows:

§275.12 Review of active cases.

* * * * *

(f) * * *

(2) *Basis of issuance of errors.* If the reviewer determines that SNAP allotments were either overissued or underissued to eligible households in the sample month, the State agency shall code and report any variances that directly contributed to the error determination that were discovered and verified during the course of the review. For fiscal year 2014, only variances that exceed \$37.00 (the threshold) shall be included in the calculation of the underissuance error rate, overissuance error rate, and payment error. For fiscal years 2015 and thereafter, this QC tolerance level shall be adjusted annually by the percentage by which the Thrifty Food Plan (TFP) for the 48 contiguous States and the District of Columbia is adjusted. If the State agency has chosen to report information on all variances in elements of eligibility and basis of issuance, the reviewer shall code and report any other such variances that were discovered and verified during the course of the review.

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9. In §275.23:

a. Revise paragraphs (e)(1)(i) through (iii) .

b. Remove paragraph (e)(1)(iv).

The revisions read as follows:

§275.23 Determination of State agency program performance

* * * * *

(e) * * *

(1) * * *

(i) Require the State agency to invest up to 50 percent of the liability in activities to improve program administration (new investment money shall not be matched by Federal funds) and

(ii) Designate up to 50 percent of the liability as “at-risk” for repayment if a liability is established based on the State agency’s payment error rate for the subsequent fiscal year, or

(iii) Choose any combination of these options.

* * * * *

10. In §275.24, add paragraph (a)(8) to read as follows:

§275.24 High performance bonuses.

(a) * * *

(8) Bonus award money shall be used only on SNAP-related expenses including, but not limited to, investments in technology; improvements in administration and distribution; and actions to prevent fraud, waste and abuse.

(i) Bonus payments shall not be used for household benefits, including incentive payments.

(ii) State agency awardees shall submit their intended spending plans of bonus payments to FNS to verify appropriate use.

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Dated: August 27, 2015.

Audrey Rowe
Administrator

Food and Nutrition Service

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